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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JUVENAL LOPEZ, Defendant and Appellant.	C082176 (Super. Ct. No. 14F00813)

A jury found defendant Juvenal Lopez guilty of committing numerous sex crimes against two of his adopted daughters and one of his stepgranddaughters when they were under 10 years old. (Pen. Code, §§ 288, subds. (a) [lewd and lascivious act] & (b)(1) [forcible lewd and lascivious act],[1] 269, subd. (a)(1)/261, subd. (a)(2) [aggravated sexual

[1] Undesignated statutory references are to the Penal Code.

assault of a child—forcible rape], 269, subd. (a)(4)/former 288a [aggravated sexual assault of a child—oral copulation].[2]) The jury also found true the allegations that there were multiple victims (§ 667.61, subd. (e)(4)) and that defendant had suffered three prior serious felony convictions within the meaning of the "Three Strikes" law (§§ 667, subds. (a)-(i), 1170.12). The trial court sentenced him to an aggregate term of 162 years to life in state prison.

On appeal, defendant contends the trial court erred in admitting evidence of prior sexual offenses. Anticipating that he may have forfeited this claim, defendant alternatively argues his trial counsel was ineffective. In addition, defendant contends the trial court erred in excluding impeachment evidence and in admitting expert evidence. Defendant also contends that reversal is required because law enforcement engaged in outrageous conduct during pretrial interviews of two of the victims, and because the prosecutor committed misconduct on two occasions during closing argument. Anticipating that he may have forfeited his prosecutorial misconduct claims, defendant alternatively argues his trial counsel was ineffective. Finally, defendant contends the judgment must be reversed due to cumulative error.

We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

We recite only the underlying facts relevant to the resolution of this appeal. Additional background information pertinent to the claims raised on appeal is discussed *post.*

From 1996 to 2000, defendant repeatedly molested two of his adopted daughters, B.D. (born Mar. 1991) and L.D. (born Mar. 1994), and one of his stepgranddaughters,

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[2] Effective January 1, 2019, section 288a was amended and renumbered as section 287. (Stats. 2018, ch. 423, § 49.) The amendment has no impact on this appeal.

Y.D. (born Sept. 1993), when they were between the ages of four and nine. The molestation included touching of the vagina and chest area, kissing, oral copulation, sodomy, rape, and digital penetration of the vagina. Defendant also made L.D. and Y.D. touch each other's "private area." The molestation occurred in various places inside and around the outside of defendant's home.

At all relevant times, C.L. was married to defendant. They adopted six children together, including B.D. and L.D. Prior to marrying defendant, C.L. had four biological children, including C.E. C.E. has several children, including A.D., B., and Y.D.[3] C.L. is their grandmother and defendant is their stepgrandfather.

The victims in this case did not immediately report the molestation because they were scared. According to Y.D., defendant threatened to molest her sisters if she told anyone about the abuse. Defendant also threatened B.D. He told her that he would hurt her little brother and sister if she reported the abuse. When B.D. was in third grade, she told C.L. about the molestation but C.L. did not believe her. C.L. accused B.D. of lying, spanked her, and forced her to write an apology letter to defendant. C.L. also accused Y.D. of lying when she disclosed the molestation.

In 2000, defendant was charged with committing numerous sex crimes against three family members—two of his stepgranddaughters, A.D. and B., and one of his stepnieces, D.D. During the investigation into these claims of abuse, Y.D., who was around seven years old, denied that defendant had molested her. L.D., who was around six years old, said that defendant had never touched her inappropriately. She explained that C.L. had instructed her not to say anything about the abuse and to say whatever she could to keep defendant out of jail. B.D., who was around nine years old, also did not

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[3] A.D. and B. are Y.D.'s older sisters. B. has the same first initial as one of the victims in this case. To avoid confusion, we refer to her as B.

report any molestation. According to B.D., C.L. warned her that she would "mess" the family up if she disclosed the abuse to investigators.

At some point prior to trial, C.E. confronted C.L. about defendant molesting her daughters—A.D. and B. C.L. accused C.E. of lying and "disowned" her entire family. At trial, both B.D. and L.D. testified that defendant had never molested them.[4] C.L. testified on behalf of defendant.

In 2002, a jury found defendant guilty of molesting B., including two counts of committing a lewd and lascivious act with a child under the age of 14 years (§ 288, subd. (a)) and one count of oral copulation of a child under the age of 14 years (§ 288a, subd. (c)(1)). The jury could not reach a verdict or acquitted defendant on various other sex crimes involving A.D., B., and D.D. The trial court sentenced defendant to 12 years in state prison.

Following his release from prison, defendant was accused of molesting a neighbor's four-year-old daughter (L.F.) in 2013. During the investigation into this claim of abuse, law enforcement interviewed L.D. and Y.D. Over the course of their interviews, L.D. and Y.D. disclosed that defendant had molested them. An investigator from the district attorney's office investigated B.D.'s claims of abuse against defendant, some of which had been reported to law enforcement in 2007.

In 2016, defendant was charged in this case by second amended information with committing 15 sex crimes against four victims—B.D., L.D., Y.D., and L.F. The crimes

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[4] At trial in this case, B.D. explained that she lied at defendant's prior trial because she did not want to "mess" the family up. She noted that C.L. had told her numerous times not to say anything about the molestation because it would break the family apart. She also noted that C.L. made her and her siblings write letters for the court in the prior case stating that defendant was a good dad. According to B.D., C.L. told them what to say in the letters. When L.D. testified in this case, she explained that she had lied about defendant molesting her because C.L. had told her not to say anything.

included 11 counts of committing a lewd and lascivious act with a child under the age of 14 years (§ 288, subd. (a)), one count of committing a forcible lewd and lascivious act with a child under the age of 14 years (§ 288, subd. (b)(1)), one count of aggravated sexual assault of a child—oral copulation (§ 269, subd. (a)(4)/former 288a), and two counts of aggravated sexual assault of a child—forcible rape (§ 269, subd. (a)(1)/261, subd. (a)(2)). It was also alleged that there were multiple victims (§ 667.61, subd. (e)(4)) and that defendant had suffered three prior serious felony convictions within the meaning of the Three Strikes law (§§ 667, subds. (a)-(i), 1170.12).

After a jury trial,[5] defendant was found guilty on all counts, except for two counts of committing a lewd and lascivious act with a child under the age of 14 years.[6] The jury also found true the multiple victim and prior conviction allegations. The trial court sentenced defendant to an aggregate term of 162 years to life in state prison.

Defendant filed a timely notice of appeal.

DISCUSSION

1.0 Evidence of Prior Sexual Offenses

Defendant contends the trial court erred in admitting evidence of prior sexual offenses that were not charged in this case. He argues that the court violated his constitutional rights to due process and confrontation by allowing the People to introduce certified official records of conviction instead of requiring B. to testify at trial. Defendant further contends that the prior sexual offense evidence should have been excluded under Evidence Code section 352 because its probative value was substantially outweighed by

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[5] C.L. died before the trial in this case commenced. Some of her testimony from the prior trial was read to the jury.

[6] The jury found defendant not guilty on the only count involving L.F. The jury could not reach a unanimous decision on one of the counts involving L.D. The trial court declared a mistrial as to that count.

its prejudicial effect. Anticipating that his claim of error may have been forfeited, defendant alternatively argues his trial counsel was ineffective.

We find no evidentiary error. Because we reject defendant's claims of error on the merits, we do not address the People's forfeiture arguments or defendant's ineffective assistance claim.

1.1 *Additional Information*

Prior to trial, the People filed an in limine motion requesting permission to introduce evidence of prior sexual offenses committed by defendant to prove his propensity to molest young girls. The People advised the court that it intended on introducing this evidence through the testimony of two witnesses (A.D. and D.D.) and documentary evidence (certified official records of conviction) showing that defendant was previously convicted of molesting B. In support of its motion, the People represented that defendant's molestation of B. started when she was between the ages of six and eight years old and included rape, oral copulation, and touching of her breasts and vagina while they were in defendant's swimming pool. As for A.D., the People represented that defendant's molestation of her started when she was in kindergarten and included, among other things, touching of her vagina under her shorts while they were in defendant's swimming pool. As for D.D., the People represented that defendant's molestation of her occurred when she was under 10 years old and involved an incident where he stuck his tongue in her ear, and another incident where he pressed his erect penis against her stomach and used his leg to rub her vagina while they were hugging.

Defendant filed his own in limine motion requesting the trial court exclude evidence of prior sexual offenses. He argued that this evidence was inadmissible because it was not relevant "under a lawful theory of relevance." He further argued that, even if the evidence was relevant, its minimal probative value was substantially outweighed by its prejudicial effect. In addition, defendant argued that the certified official records of

conviction were only admissible to establish the fact of a prior conviction and were not admissible to prove the facts underlying the criminal conduct because the People had not established the foundational requirements for the official records hearsay exception. Finally, defendant asserted that his constitutional right to confront and cross-examine witnesses would be violated by the introduction of the records rather than the live testimony of B.

At the hearing on the parties' in limine motions, the prosecutor clarified that she only intended on calling A.D. to testify about the prior sexual offenses, explaining that B. was extremely traumatized by what defendant had done to her and did not want to testify. The prosecutor confirmed that she intended on introducing certified official records of conviction as evidence of the prior sexual offenses involving B.

Following a discussion about the fairness of admitting the certified records of conviction when B. was technically available to testify, defense counsel conceded that the allegations in this case involving B.D. were "remarkably similar" to the prior sexual offenses involving B.[7] Defense counsel then stated, "My concern is that . . . if [the jurors] only get the certified record[s] o[f] conviction . . . , they don't get the benefit of knowing that a jury specifically found [defendant] not guilty of raping [B.]." Counsel further stated, "[I]f the court is inclined to [admit the records], I think, only in fairness the jury must be instructed that [defendant] was not convicted of everything, he was specifically not convicted of the rape. [¶] The only additional concern I have [in not] calling [B.] and simply presenting the papers [is that] it does prevent . . . the Defense from making a certain argument. I think some of those arguments would be allowed to

[7] The allegations in this case involving B.D. included defendant touching her breasts and vagina underneath her bathing suit, oral copulation, and rape. The allegations involving Y.D. and L.D., collectively, included, among other things, rape, oral copulation, and touching of the vagina and breasts. The alleged molestation occurred over several years and started when the victims were between the ages of four and six.

be made if the jury is instructed that there were additional findings of not guilty or that they did not reach a verdict on other counts." In response, the prosecutor indicated that the parties could "probably" enter into a stipulation addressing defense counsel's concerns.

After a lengthy discussion of the Evidence Code section 352 factors, the trial court ruled that the prior sexual offense evidence was admissible, except for certain acts involving A.D. that allegedly occurred when she was between the ages of 12 and 13. The court concluded that the admissible prior sexual offense evidence was "extremely probative" of defendant's propensity to commit the charged offenses, and that the probative value of the evidence was not substantially outweighed by its prejudicial effect. In so concluding, the court found that the prior sexual offenses were not too remote in time, were "very similar" in character to the charged offenses, and were not more inflammatory than the charged offenses. The court additionally found that the introduction of the evidence would not create a serious danger of undue prejudice, consume an undue amount of time, confuse the issues, or mislead the jury.

The court also ruled that the People could introduce the certified official records of conviction related to the sex crimes defendant had committed against B. but noted that, pursuant to the parties' proposed stipulation, the jurors would be informed that the prior jury found defendant not guilty on one of the offenses involving B. In so ruling, the court found that admitting the certified records would not violate the confrontation clause, reasoning that records of conviction are nontestimonial.

At trial, A.D. testified that defendant touched her vagina under her bathing suit on one occasion while they were in his swimming pool when she was four or five years old. Pursuant to a stipulation entered into by the parties, the jurors were informed that, in 2002, defendant was found guilty of committing three sex crimes against B.—two counts of lewd and lascivious acts with a child under the age of 14 years (§ 288, subd. (a)) and

one count of oral copulation with a child under the age of 14 years (§ 288a, subd. (c)(1)). The jurors were also informed that defendant was found not guilty of aggravated sexual assault of a child—rape of B. (§ 269, subd. (a)(1)/261, subd. (a)(2)), and that the jury in the prior case was unable to reach a unanimous decision as to the remaining counts involving B., which included four counts of lewd and lascivious acts with a child under the age of 14 years (§ 288, subd. (a)) and one count of aggravated sexual assault of a child—rape (§ 269, subd. (a)(1)/261, subd. (a)(2)). Finally, the jurors were informed that the prior jury was unable to reach a unanimous decision on two counts of lewd and lascivious acts with a child under the age of 14 years (§ 288, subd. (a)) involving A.D.

At the close of trial, the trial court instructed the jury on the limited purpose for which the prior sexual offense evidence could be used pursuant to CALCRIM No. 1191 (now CALCRIM No. 1191A). The jurors were told that if they decided defendant had committed one or more of the prior sexual offenses by a preponderance of the evidence, they could, but were not required to, conclude that he committed the charged offenses. The jurors were further told that their conclusion that defendant committed one or more of the prior sexual offenses was one factor to consider along with the other evidence, and was not sufficient by itself to prove that he was guilty of any of the charged offenses.

1.2 *Analysis*

"Character evidence, sometimes described as evidence of a propensity or disposition to engage in a type of conduct, is generally inadmissible to prove a person's conduct on a specified occasion." (*People v. Villatoro* (2012) 54 Cal.4th 1152, 1159; Evid. Code, § 1101, subd. (a).) The Legislature, however, has created an exception to this rule in cases involving sexual offenses. (Evid. Code, § 1108, subd. (a).) " 'Evidence Code section 1108 authorizes the admission of evidence of a prior sexual offense to establish the defendant's propensity to commit a sexual offense, subject to exclusion under Evidence Code section 352.' [Citations.] 'By removing the restriction on

character evidence in section 1101, section 1108 now "permit[s] the jury in sex offense . . . cases to consider evidence of prior offenses *for any relevant* purpose" [citation], subject only to the prejudicial effect versus probative value weighing process required by section 352.' " (*People v. Hollie* (2010) 180 Cal.App.4th 1262, 1273-1274 (*Hollie*).)[8]

"To be admissible under [Evidence Code] section 1108, 'the probative value of the evidence of uncharged crimes "must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury." [Citations.]' [Citation.] 'The principal factor affecting the probative value of an uncharged act is its similarity to the charged offense. Other factors affecting the probative value include the extent to which the source of the evidence is independent of the charged offense, and the amount of time between the uncharged acts and the charged offense. The factors affecting the prejudicial effect of uncharged acts include whether the uncharged acts resulted in criminal convictions and whether the evidence of uncharged acts is stronger or more inflammatory than the evidence of the charged offenses.' [Citation.] 'The weighing process under [Evidence Code] section 352 depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon the mechanical application of automatic rules.' " (*Hollie*, *supra*, 180 Cal.App.4th at p. 1274.)

"We will only disturb the trial court's exercise of discretion under Evidence Code section 352 'when the prejudicial effect of the evidence clearly outweighed its probative

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8 Evidence Code section 1108, subdivision (a) provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." That provision provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

value.' [Citation.] A trial court abuses its discretion when its ruling 'falls outside the bounds of reason.' " (*Hollie, supra,* 180 Cal.App.4th at p. 1274.)

We reject defendant's initial contention that the trial court erred in ruling that the prior sex crimes he committed against B. could be proven with certified records of conviction. In all criminal prosecutions, the defendant has a federal constitutional right "to be confronted with the witnesses against him." (U.S. Const., 6th Amend.) In *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177], the Supreme Court held that the admission at a trial of out-of-court testimonial statements violates a criminal defendant's right to confrontation, unless the declarant of the statement is unavailable at trial and the defendant has had a prior opportunity to cross-examine him or her. (541 U.S. at pp. 54, 68.)

Contrary to defendant's contention, the admission of the certified records of conviction did not violate his constitutional rights to due process and confrontation. As the trial court correctly concluded, the records were not testimonial. Prior conviction records under section 969b are "prepared to document acts and events relating to convictions and imprisonments. Although they may ultimately be used in criminal proceedings, as the documents were here, they are not prepared for the purpose of providing evidence in criminal trials or for determining whether criminal charges should issue. Therefore, these records are beyond the scope of *Crawford . . . .*" (*People v. Taulton* (2005) 129 Cal.App.4th 1218, 1225; see *People v. Moreno* (2011) 192 Cal.App.4th 692, 710-711.)

We also reject defendant's contention that the trial court erred in ruling that the prior sexual offense evidence was admissible under Evidence Code section 352. The record discloses that the court thoroughly analyzed and weighed the relevant factors in determining that the evidence was admissible.

The trial court considered the similarity of the prior sexual offenses to the charged offenses, which courts have recognized as " '[t]he principal factor affecting the probative value of an uncharged act . . . .' " (*Hollie*, *supra*, 180 Cal.App.4th at p. 1274.) We agree with the trial court's conclusion that the prior sexual offenses and the charged offenses were very similar in nature, as they involved the same type of sexual acts against young girls in defendant's family. Thus, the prior sexual offense evidence was highly probative of defendant's propensity to commit the charged offenses.

The trial court also considered the amount of time between the prior sexual offenses and the charged offenses, and that the sources of evidence for the prior offenses were independent of the sources of evidence for the charged offenses. Further, the court considered the prejudicial effect of the prior sexual offense evidence. The court correctly noted that some of the prior sexual offenses resulted in criminal convictions, and found that evidence of the prior sexual offenses was not more inflammatory than the charged offenses. The court also found that admission of the evidence would not necessitate an undue consumption of time, confuse the issues, or mislead the jury.

After considering both the probative value of the prior sexual offense evidence and its prejudicial effect, we conclude the trial court did not abuse its discretion in admitting the evidence.

We are unpersuaded by defendant's contention that the trial court erred in admitting evidence of the prior sexual offenses that did not result in a conviction. Defendant asserts that these acts were not probative and were unduly prejudicial. He asserts that the jury likely convicted him in this case to punish him for his prior actions. According to defendant, there was a "danger" that the jury punished him for the sexual offenses the prior jury was not convinced he had committed. The record reflects that the trial court effectively instructed the jury to consider specific prior sexual offenses for a proper limited purpose. There was only one prior sexual offense identified in the

instruction that the prior jury was not convinced defendant had committed. That offense was the sexual offense A.D. testified about at trial. The jurors were instructed that if they concluded defendant had committed one or more of the prior sexual offenses, that conclusion was only one factor to consider in determining defendant's guilt, and was not sufficient, by itself, to prove defendant was guilty of the charged offenses. "[W]e must presume the jury adhered to the admonitions." (*Hollie*, *supra*, 180 Cal.App.4th at p. 1277.)

Finally, we find no merit in defendant's suggestion that the trial court erred in admitting the prior sexual offense evidence because "none of the prior conduct allegations, and or convictions, involved unrelated victims." According to defendant, because the victims were all "steeped in the ongoing family drama," the prior sexual offenses "were not independent instances of misconduct." We are unpersuaded that the probative value of the prior sexual offense evidence was diminished in any way by the fact that all of the victims were related. To the contrary, the probative value of the evidence, which stemmed from the similarity between the prior offenses and the charged offenses, was increased by the fact that the sources of evidence for the prior offenses were independent of the sources of the evidence for the charged offenses. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404 [probative value of uncharged acts is increased if the source is independent of evidence of the charged offenses].) The critical evidence in both cases was the testimony of the accusers. A.D. and B. testified against defendant in the prior trial while B.D., L.D., and Y.D. testified against him in the underlying trial.

2.0 Exclusion of Impeachment Evidence

Defendant contends the trial court erred in excluding evidence that L.D. worked as a prostitute and had made a false complaint of rape. According to defendant, this evidence was relevant to impeach L.D.'s credibility and its exclusion violated his constitutional right to confrontation. We find no error.

2.1 *Additional Background*

Prior to trial, defendant filed an in limine motion requesting permission to introduce evidence that L.D. worked as a prostitute for impeachment purposes. He asserted that such evidence was admissible because prostitution is conduct involving moral turpitude. At the hearing on the parties' in limine motions, the trial court excluded this evidence on the ground that its probative value was substantially outweighed by its prejudicial effect. The court concluded that the probative value of the evidence was, at most, slight, and that its admission would confuse the jury and consume an undue amount of time. The court explained that it did not want to have a "mini-trial" on whether L.D. committed acts of moral turpitude. After defense counsel represented that she intended on calling only one witness if L.D. denied committing acts of prostitution, the court stated that its ruling was preliminary and subject to reconsideration based on the evidence introduced at trial. The court indicated that it would revisit the issue if either party provided a reason why the evidence should be allowed.

During the cross-examination of L.D., defense counsel requested permission to introduce evidence showing that L.D. had made a false complaint of rape. The offer of proof related to an incident in which L.D. and her boyfriend arranged a "date" with a man to engage in acts of prostitution with the intent of robbing him. According to the offer of proof, when "things went wrong," L.D.'s boyfriend shot the man. Thereafter, L.D. told a family member that she had falsely claimed she was being raped at the time of the shooting to avoid getting into trouble. The prosecutor objected to the introduction of this evidence. She noted that it was not proper impeachment evidence unless the false allegation was proven true, and argued that the evidence should be excluded because there was no independent corroboration that L.D. made a false claim of rape and such a showing would consume a "huge" amount of time and "basically" become a "trial within a trial."

The trial court excluded the evidence under Evidence Code section 352. In doing so, the court agreed with the prosecutor that a rape complaint does not reflect on the credibility of the complaining witness unless the complaint is proven false, and reasoned that any probative value of the proffered evidence was substantially outweighed by its prejudicial effect, including the undue consumption of time, undue prejudice, and the probability that the evidence would confuse the issues and mislead the jury. The court noted that proving the alleged false complaint of rape would likely require the introduction of additional testimony and other evidence.

2.2 *Analysis*

2.2.1 Exclusion of Evidence of Prostitution

"A witness may be impeached with any prior conduct involving moral turpitude whether or not it resulted in a felony conviction, subject to the trial court's exercise of discretion under Evidence Code section 352." (*People v. Clark* (2011) 52 Cal.4th 856, 931.) "[T]he latitude [Evidence Code] section 352 allows for exclusion of impeachment evidence in individual cases is broad. The statute empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." (*People v. Wheeler* (1992) 4 Cal.4th 284, 296.) " '[T]his court will not disturb a trial court's exercise of discretion under Evidence Code section 352 unless it is shown the trial court exercised its discretion " 'in an arbitrary, capricious or patently absurd manner.' " ' " (*People v. Homick* (2012) 55 Cal.4th 816, 865.)

"Prostitution is a crime of moral turpitude." (*People v. Chandler* (1997) 56 Cal.App.4th 703, 709.) However, our Supreme Court has observed that testimony from a witness about her acts of prostitution has "an obvious potential for embarrassing or unfairly discrediting her," and the "degrading impact of such questions has long been recognized." (*People v. Phillips* (2000) 22 Cal.4th 226, 234.) Impeachment with such evidence is highly prejudicial and is properly excluded unless it is substantially

outweighed by its probative value. (*Ibid*.) In *Phillips*, similar evidence was properly excluded where it was marginally relevant to the issue of the defendant's alibi. (*Ibid*.)

Here, evidence that L.D. engaged in acts of prostitution had little probative value regarding her credibility as to her claims of abuse against defendant and was irrelevant to any other issue in this case. Thus, the trial court acted well within its discretion in excluding the evidence.

2.2.2 Exclusion of Evidence of False Complaint of Rape

A prior false complaint of rape is relevant and admissible on the issue of a witness's credibility. (*People v. Tidwell* (2008) 163 Cal.App.4th 1447, 1456-1457.) However, a prior rape complaint has no bearing on credibility unless it is also established that the complaint was false. (*Id*. at pp. 1457-1458 ["The value of the evidence as impeachment depends upon proof that the prior [complaint was] false."].) Such evidence is subject to exclusion under Evidence Code section 352. (*Tidwell*, at p. 1458.)

We find no error in the trial court's exclusion of evidence. Since the probative value of the proffered evidence as impeachment depended upon proof the rape complaint was false, the parties would have been required to litigate the truthfulness of a past sexual claim. The proffered evidence concerning falsity was weak. It only included one witness who was not present during the incident that gave rise to the allegedly false complaint of rape. The trial court reasonably concluded that additional evidence would be required to prove that L.D. made a false complaint of rape. Under the circumstances, we cannot say that the trial court abused its discretion in concluding that the probative value of the evidence was substantially outweighed by its prejudicial effect. The court's ruling was not arbitrary, capricious, or patently absurd. There was no conclusive evidence that the complaint was false, and litigating the truthfulness of the complaint would have consumed considerable time and diverted the jury's attention from the case at hand.

2.2.3 Confrontation Clause

" ' "[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby, 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.' " [Citations.] However, not every restriction on a defendant's desired method of cross-examination is a constitutional violation. Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance. [Citations.] California law is in accord. [Citation.] Thus, unless the defendant can show that the prohibited cross-examination would have produced "a significantly different impression of [the witnesses'] credibility" [citation], the trial court's exercise of its discretion in this regard does not violate the Sixth Amendment.' " (*People v. Virgil* (2011) 51 Cal.4th 1210, 1251.)

Defendant contends that his constitutional right to confront L.D. was violated by the trial court's exclusion of his proffered impeachment evidence. He did not, however, raise this objection below, and therefore has forfeited his claim on appeal. (See *People v. Redd* (2010) 48 Cal.4th 691, 730 [the defendant "did not raise an objection below based upon the confrontation clause, and therefore has forfeited this claim"]; *People v. Tafoya* (2007) 42 Cal.4th 147, 166.)

But even if defendant's constitutional claim had been properly raised, it fails on the merits. Our Supreme Court has repeatedly stated that the application of ordinary evidentiary rules, as was the case here, does " 'not impermissibly infringe on [a defendant's] right to present a defense.' " (*People v. Cudjo* (1993) 6 Cal.4th 585, 611.) Defendant has not shown that the prohibited cross-examination would have produced a significantly different impression of L.D.'s credibility. As discussed *ante*, the proffered

evidence, at best, had minimal impeachment value. Further, the record reflects that defense counsel had a sufficient opportunity to cross-examine L.D. about the multiple statements she made claiming that she had never been molested, including her testimony at defendant's prior trial denying he had molested her. Defense counsel also questioned L.D. about statements she made to detectives in 2015 indicating that she could not remember if defendant had molested her, and the sexual assault allegation she made against her brother and her subsequent retraction of that allegation. At trial, L.D. admitted that she told detectives in 2015 that she did not have a specific memory of being molested until they suggested defendant had molested her in certain ways. She also admitted that she lied to law enforcement when she retracted the sexual assault allegation made against her brother.

3.0 Admission of Expert Evidence

Defendant contends the trial court violated his constitutional rights to a jury trial and due process by allowing the prosecutor's expert on child sexual abuse and Child Sexual Abuse Accommodation Syndrome (CSAAS) to testify about the low percentage of false allegations of sexual abuse made by children. We disagree.

3.1 *Applicable Legal Principles*

The opinion testimony of an expert witness is admissible if it is: (1) "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact"; and (2) "[b]ased on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion." (Evid. Code, § 801, subd. (a).) " '[T]he admissibility of expert opinion is a question of degree. The jury need not be wholly

ignorant of the subject matter of the opinion in order to justify its admission . . . . [E]ven if the jury has some knowledge of the matter, expert opinion may be admitted whenever it would "assist" the jury. It will be excluded only when it would add nothing at all to the jury's common fund of information, i.e., when "the subject of inquiry is one of such common knowledge that men [or women] of ordinary education could reach a conclusion as intelligently as the witness" ' [citation]." (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1299-1300 (*McAlpin*).)

CSAAS consists of five emotional behaviors that have been observed in children who have experienced sexual abuse: (1) secrecy, (2) helplessness, (3) entrapment and accommodation, (4) delayed disclosure, and (5) retraction. (See *People v. Bowker* (1988) 203 Cal.App.3d 385, 389 (*Bowker*).) While CSAAS testimony is inadmissible to prove that a molestation occurred, it is nevertheless admissible to rehabilitate a putative victim's credibility when the defense suggests the child's conduct after the incident—e.g., a delay in reporting—is inconsistent with the claim of abuse. (*McAlpin*, *supra*, 53 Cal.3d at p. 1300.) " 'Such expert testimony is needed to disabuse jurors of commonly held misconceptions about child sexual abuse, and to explain the emotional antecedents of abused children's seemingly self-impeaching behavior.' " (*Id*. at p. 1301.) "CSAAS *assumes* a molestation has occurred and seeks to describe and explain common reactions of children to the experience. [Citation.] The evidence is admissible *solely* for the purpose of showing that the victim's reactions as demonstrated by the evidence are not inconsistent with having been molested." (*Bowker*, *supra*, at p. 394.)

"Because the line between impermissible use of expert testimony to prove the child was abused, and permissible use of such testimony to ' "explain the emotional antecedents of abused children's seemingly self-impeaching behavior . . ." ' [citation], is by no means a bright one, the better practice is to limit the expert's testimony to observations concerning the behavior of abused children as a class and to avoid testimony

which recites either the facts of the case at trial or obviously similar facts." (*People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1383-1384 (*Gilbert*).) In addition, CSAAS evidence must be tailored to counter "a specific 'myth' or 'misconception' suggested by the evidence." (*Bowker*, *supra*, 203 Cal.App.3d at pp. 393-394.) "In the typical criminal case, . . . it is the People's burden to identify the myth or misconception the evidence is designed to rebut." (*Id*. at p. 394.) However, the People need not expressly state which evidence is inconsistent with a finding of abuse. (*People v. Patino* (1994) 26 Cal.App.4th 1737, 1744-1745 (*Patino*).) "It is sufficient if the victim's credibility is placed in issue due to the paradoxical behavior, including a delay in reporting a molestation." (*Ibid*.) Admission of CSAAS evidence "is not error merely because it was introduced as part of the prosecution's case-in-chief rather than in rebuttal. The testimony is pertinent and admissible if an issue has been raised as to the victim's credibility." (*Id*. at p. 1745.)

"[T]he decision of a trial court to admit expert testimony 'will not be disturbed on appeal unless a manifest abuse of discretion is shown.' " (*McAlpin*, *supra*, 53 Cal.3d at p. 1299.)

3.2 *Additional Information*

Prior to trial, the People filed an in limine motion requesting permission to introduce expert testimony about child molestation victims as a class for the purpose of dispelling certain misconceptions about child molestation. In other words, the People sought permission to present CSAAS evidence. The People argued that, because the defense would likely attack the credibility of the victims, CSAAS evidence was relevant and admissible to rehabilitate the victims' credibility by disabusing jurors of the following commonly held myths and misconceptions about how child molestation victims react: "1) since the victims did not disclose the molests immediately after the first time, some of the described molests did not occur or they are less believable, 2) since the victim[s] did not appear frightened, upset, or traumatized by the defendant's conduct,

some of the molests did not occur, 3) since the victim[s] continued to socialize with the defendant around the house despite being touched, some (if not all) of the described molests did not occur, 4) since the victims do not know specifics regarding dates and times of the molests, some of the molests did not occur, 5) the victims should have been able to do something to protect themselves from being molested, and 6) since the victim[s] gradually disclosed the abuse and did not come out with each and every detail to the first adult, some of the molestations did not occur or are exaggerated."

In support of its motion, the People represented that their expert would not testify that defendant "fits a profile" or that his conduct is consistent with a molester. In addition, the People represented that its expert would not vouch for the credibility of the victims, opine that they suffer from a syndrome that would imply the truth of their allegations, or opine that they were actually molested. Instead, the People stated that their expert would testify about the behavior of child abuse victims as a class for the purpose of educating the jurors as to why victims of such abuse would act in a counterintuitive way, such as delay in reporting or never reporting the abuse at all.

Defendant filed his own motion in limine requesting an order excluding or limiting the introduction of CSAAS evidence. Specifically, he requested the court exclude all CSAAS evidence because it is inherently unreliable. Alternatively, he requested the trial court narrowly limit the expert testimony to the specific myths and misconceptions the evidence is designed to rebut and an explanation why such behavior may not be inconsistent with a child having been abused. Defendant also requested an instruction on the limited purpose of CSAAS evidence.

At the hearing on the parties' in limine motions, the trial court ruled that the proffered expert testimony on CSAAS was admissible with one exception,[9] but noted that it was willing to hold a hearing on whether it was appropriate to limit the scope of the testimony based on the myths and misconceptions raised by the evidence introduced at trial. The court also indicated that it would instruct the jury on the limited purpose of CSAAS evidence.

During the hearing, neither party mentioned the admissibility or exclusion of testimony related to false allegations of sexual abuse by children in general. As such, the trial court did not specifically rule on the admissibility of such evidence.

At trial, Blake Carmichael, Ph.D., a psychologist, testified as a prosecution expert on child sexual abuse and the effect of sexual abuse on children. Prior to his testimony the trial court instructed the jurors on the limited purpose of his testimony pursuant to CALCRIM No. 1193: "You will hear testimony from Dr. Blake Carmichael regarding the behavior of victims of sexual abuse or [CSAAS]. [¶] This testimony is not intended and should not be used to determine whether any molestation claims are true. It is not evidence that defendant committed any of the charged crimes. [¶] As I previously instructed you, defendant is presumed innocent until the prosecution proves otherwise. You may consider this evidence solely for the purpose of, one, considering whether the conduct in this case, as demonstrated by the evidence, is not inconsistent with having been molested and, two, in evaluating the believability of these witnesses' testimony."

As relevant here, the prosecutor asked Dr. Carmichael whether there were "any studies that indicate whether kids who have been maltreated in some way are less likely

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[9] The trial court excluded evidence pertaining to the fifth misconception identified in the People's motion—the victims should have been able to do something to protect themselves from being molested. The parties agreed that this misconception was not relevant.

to fabricate or make up stories about child sexual abuse?" In response, Dr. Carmichael stated, "There are studies that talk about . . . false allegations." At this point, defense counsel objected on the ground that this issue was beyond the scope of Dr. Carmichael's expertise and qualifications. After the trial court overruled the objection, Dr. Carmichael testified as follows: "So there are studies that talk about false allegations with kids and the vast majority of cases show around 2 to 6 percent of allegations about sexual abuse were deemed false. [¶] But it's an important qualification that the higher rates of false allegations found are in custody disputes where there's a custody matter in play, and the vast majority of those false allegations are made by the custodial parent, the parent who has the child and it's usually like access to visitation, things like that. And there's a very large study by Trocme and Bala, 2005, I believe, that took a look at over 900 of these cases in child sexual abuse cases and although the parents again and the rates of 2 to 4 percent were initiating claims of sexual abuse that were found not to be true or falsely alleged, none of the kids in that study had made those allegations and so the general sense of the literature is that false allegations made by a child against a parent is rare." When asked, Dr. Carmichael indicated that he did not know anything about this case, including the names of the victims.

On cross-examination, Dr. Carmichael confirmed that multiple studies showed that 2 to 6 percent of allegations of child sexual abuse were found to be false. He also reiterated that false allegations made by children are rare but do happen, and acknowledged that there is "no clinical method" to determine with certainty whether a claim of abuse is true or not.

At the close of evidence, the jury was, again, instructed on the limited purpose of Dr. Carmichael's testimony pursuant to CALCRIM No. 1193.

3.3 *Analysis*

Defendant recognizes that Dr. Carmichael did not directly opine on the credibility of the victims in this case. However, he contends that Dr. Carmichael's testimony about "the very high rate of truthfulness among . . . children who make allegations of sexual abuse . . . was little different than expert testimony about the defendant's guilt or the veracity of the [victims]." We disagree.

As an initial matter, we conclude that defendant has forfeited his claim of evidentiary error. At trial, he objected to the false allegation testimony on the ground that it was beyond the scope of Dr. Carmichael's expertise and qualifications.[10] His motion in limine sought an order excluding or limiting the presentation of CSAAS evidence. The testimony he now challenges, however, has nothing to do with CSAAS. (See *Gilbert*, *supra*, 5 Cal.App.4th at p. 1386 [expert's testimony that children are more credible than adults in reporting sexual abuse did not fall within scope of rules that apply to CSAAS evidence].) Evidence on the syndrome addresses a child's common reactions to sexual abuse and is admissible to disabuse jurors of any myths or misconceptions he or she might have regarding those reactions. (*Patino*, *supra*, 26 Cal.App.4th at p. 1744; *People v. Housley* (1992) 6 Cal.App.4th 947, 955.) Dr. Carmichael's expert testimony regarding false allegations of child sexual abuse was not offered to explain a reaction that might appear inconsistent with abuse that actually occurred but rather addressed the likelihood that a claim of abuse was true. Accordingly, because defendant's motion in limine was not directed at the particular evidence he now claims was improperly admitted, and because he did not object to the challenged evidence at trial on the same ground he now raises, he failed to preserve the issue for appeal. (See *People v. Nelson*

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[10] The record shows that the limited testimony on false allegation rates was within the scope of Dr. Carmichael's expertise on child sexual abuse. The challenged testimony was based on research on false allegations of sexual abuse made by children.

(2012) 209 Cal.App.4th 698, 711 ["The failure to raise a specific objection to the admission of evidence results in forfeiture of appellate review."].)

But even if defendant had not forfeited his claim, it lacks merit. Contrary to defendant's contention, Dr. Carmichael's testimony on false allegations of sexual abuse made by children was not "little different than expert testimony about the defendant's guilt or the veracity of the [victims]." Dr. Carmichael did not testify that children never lie about sexual abuse. Instead, he said that false allegations of sexual abuse made by children are rare, explaining that multiple studies had shown that 2 to 6 percent of child sexual abuse allegations were found to be false, and that the vast majority of the false allegations were made by an adult. Dr. Carmichael's testimony did not, as defendant suggests, amount to vouching for the victims' credibility. His testimony related to false allegations of abuse made by children in general. He did not express an opinion about whether any of the victims in this case were telling the truth or had been sexually abused. Indeed, he specifically stated that he did not know anything about this case. He also said that there is "no clinical method" to determine with certainty whether a claim of abuse is true or not, and noted that this is an issue for the jury to decide. The jury, moreover, was specifically instructed, both before and after Dr. Carmichael testified, that his testimony could not be used to determine whether any of the claims of molestation were true.

4.0 Outrageous Government Conduct

Defendant contends that reversal is required because the "prosecution team" committed "outrageous" conduct by allowing the police (rather than trained social workers) to interview Y.D. and L.D. He claims that the interviews were highly suggestive and resulted in coerced testimony in violation of his right to due process. According to defendant, he was "denied due process of law because of the contamination of [L.D.'s and Y.D.'s] testimony with coercive tactics that included a plea for help with a four year old [i.e., L.F.] who was alleged to be [defendant's] victim, leading questions,

and repeated questioning that demonstrated the detectives would not be satisfied with denials about molestations." Defendant maintains that the questioning amounted to "improper coaching or even witness tampering," which deprived him of a fair trial. We find no basis for reversal.

4.1 *Applicable Legal Principles*

"Due process guarantees that a criminal defendant will be treated with 'that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial.' " (*United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 872 [73 L.Ed.2d 1193].) "When conduct on the part of the authorities is so outrageous as to interfere with an accused's right of due process of law, proceedings against the accused are thereby rendered improper." (*Boulas v. Superior Court* (1986) 188 Cal.App.3d 422, 429; see *People v. McIntire* (1979) 23 Cal.3d 742, 748, fn. 1 ["Sufficiently gross police misconduct could conceivably lead to a finding that conviction of the accused would violate his constitutional right to due process of the law."].) For misconduct to prevent a fair trial, misconduct must be " ' "so grossly shocking and so outrageous as to violate the universal sense of justice." ' " (*People v. Maury* (2003) 30 Cal.4th 342, 418, fn. 17.)

Cases have acknowledged that dismissal is warranted when the government engaged in outrageous misconduct violating a fundamental right of the defendant and preventing the defendant from receiving a fair trial. (*People v. Uribe* (2011) 199 Cal.App.4th 836, 841, 866–869 (*Uribe*).)

"The determination of whether the government engaged in outrageous conduct in violation of the defendant's due process rights is a mixed question. The first step involves the consideration and weighing of the evidence and assessing the credibility of the witnesses to determine factually whether, and to what extent, governmental

misconduct occurred. This factual determination is clearly one that is subject to a deferential standard of review. But the second step—whether the governmental conduct constitutes outrageous conduct in the constitutional sense of violating the defendant's due process rights—involves the application of law to the established facts and is primarily a legal question. The rights of the respective parties here are extremely important ones, namely, defendant's right to a fair trial and the People's right to prosecute persons believed to be responsible for the commission of serious crimes." (*Uribe*, *supra*, 199 Cal.App.4th at pp. 857-858.)

4.2 *Analysis*

Preliminarily, we conclude that defendant has forfeited his outrageous government conduct claim by failing to raise it in the trial court. (*People v. Low* (2010) 49 Cal.4th 372, 393, fn. 11 [outrageous government conduct claim forfeited for failure to timely raise it].) Recognizing that his claim is subject to forfeiture, defendant urges us to address the issue for the first time on appeal. He argues that his claim involves the application of legal principles to uncontested facts. Even assuming that this is the type of claim we have discretion to consider for the first time on appeal, we find it lacks merit. Having reviewed the portions of the record cited by defendant, we conclude that he has failed to show that the government engaged in conduct that was "so grossly shocking and so outrageous" that it prevented him from receiving a fair trial. At trial, defense counsel cross-examined Y.D., L.D., and one of the detectives who conducted their pretrial interviews. As with most child molestation cases, the victims' credibility was the critical issue at trial. The record discloses that the jury had an adequate opportunity to assess their credibility. Defense counsel questioned each of the victims regarding their credibility, including questioning them about their prior statements indicating that defendant had never molested them. On this record, we cannot conclude that reversal is required due to outrageous government conduct.

5.0 Prosecutorial Misconduct

Defendant contends the prosecutor committed misconduct during closing argument by citing to matters outside of the record for purposes of generating sympathy for the victims and vouching for their credibility. Defendant further contends the prosecutor committed misconduct by arguing that the jury could consider the uncharged sexual offenses the prior jury did not find him guilty of committing. Anticipating that he may have forfeited his prosecutorial misconduct claims, defendant argues that his trial counsel was excused from objecting. Alternatively, he argues that his trial counsel was ineffective.

5.1 *Applicable Legal Principles*

" 'It is settled that a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature.' [Citation.] 'A prosecutor may "vigorously argue his case and is not limited to 'Chesterfieldian politeness' " [citation], and he may "use appropriate epithets warranted by the evidence." ' " (*People v. Wharton* (1991) 53 Cal.3d 522, 567-568.)

What prosecutors cannot do is refer to facts not in evidence when those facts are beyond common knowledge, common experience, history or literature. Our Supreme Court has explained that "such practice is 'clearly . . . misconduct' [citation], because such statements 'tend[ ] to make the prosecutor his own witness—offering unsworn testimony not subject to cross-examination. It has been recognized that such testimony, "although worthless as a matter of law, can be 'dynamite' to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence." ' " (*People v. Hill* (1998) 17 Cal.4th 800, 827-828 (*Hill*).) Prosecutors also may not vouch for the credibility of witnesses or otherwise bolster the veracity of their

testimony by referring to evidence outside the record. (*People v. Frye* (1998) 18 Cal.4th 894, 971 (*Frye*), overruled on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

" 'A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such " 'unfairness as to make the resulting conviction a denial of due process.' " [Citations.] Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial.' [Citation.] 'In order to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review.' [Citation.] When a claim of misconduct is based on the prosecutor's comments before the jury, ' "the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." ' " (*People v. Friend* (2009) 47 Cal.4th 1, 29.)

" 'As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.' " (*Hill, supra*, 17 Cal.4th at p. 820.) A defendant is excused from "the necessity of either a timely objection and/or a request for admonition if either would be futile. [Citations.] In addition, failure to request the jury be admonished does not forfeit the issue for appeal if ' "an admonition would not have cured the harm caused by the misconduct." ' " (*Ibid.*)

5.2 *Analysis*

As an initial matter, we conclude that defendant has forfeited his prosecutorial misconduct claims by failing to object in the trial court and request an admonishment.

Defendant has failed to demonstrate that a timely objection or request for admonition would have been futile. However, even if defendant's prosecutorial misconduct claims were preserved for appeal, they fail on the merits, as we explain below. Because we reject defendant's claims on the merits, we do not consider his ineffective assistance claim.

5.2.1 Citing Matters Outside the Record

During closing argument, the prosecutor stated: "[Defendant] violated [B.D.] and [Y.D.] and [A.D.] and [B.] in ways that no little girl should have to experience, and he never thought they'd have the courage to tell. If they did, he counted on the fact that nobody was going to believe them. [¶] There's a woman by the name of Erin Merryn. She's a child abuse survivor. She's written a book that's fairly well-known in the field. It's called 'Living for Today, Going from Incest and Molestation to Fearlessness and Forgiveness,' and in that book, she . . . states, 'Along with—' " At this point, defense counsel stated, "I'm going to object to this area of argument." After the trial court overruled the objection, the prosecutor continued: " 'Along with trust issues, one of the hardest things to deal with is the feeling of not being supported, not being believed, especially by your family.' [¶] She says, 'When I have experienced the pain and the trauma and have to live every day with the scars, I get angry when some people think it's made up.' [¶] Today is a day of reckoning for this man. It's time that [defendant] be held accountable for the full scope of what he's done."

We reject defendant's contention that the prosecutor committed misconduct by citing to matters outside of the record for purposes of generating sympathy for the victims and vouching for their credibility. The challenged remarks were grounded in the evidence regarding the victims and their family and inferences reasonably drawn therefrom. There was evidence introduced at trial showing that defendant repeatedly molested the victims in this case over the course of several years when they were under

10 years old. There was also evidence that defendant molested Y.D.'s older sisters—A.D. and B., and that C.L. did not believe B.D. or Y.D. when they disclosed the molestation to her. To the extent the prosecutor's remarks could be construed as implying that the victims were truthful about their claims of molestation, the prosecutor did not suggest personal knowledge on the topic. As explained by our Supreme Court, "[S]o long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the 'facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief,' [the prosecutor's] comments cannot be characterized as improper vouching." (*Frye*, *supra*, 18 Cal.4th at p. 971.)

5.2.2 Referring to Evidence of Prior Sexual Offenses in Closing Argument

During closing argument, the prosecutor stated: "Now, you're going to be given a special jury instruction that deals with defendant's prior conduct, his prior uncharged conduct, and this is a significant factor that you get to consider in your overall analysis of this case, okay. [¶] So we know that defendant has three prior convictions for child molestation regarding [B.]. Two of those charges were the [section] 288[, subdivision] (a) charges, that first slide we looked at, the sexual touching of some kind. [¶] The third one was oral copulation, and we just went through that slide a moment ago. [¶] You also know that there were many other charges regarding [B.], one of which was a rape charge, where the jury found him not guilty on that. There was another rape charge, where the jury couldn't decide. They couldn't come to a unanimous decision. And then there were a couple other charges regarding [B.], where the jury could not come to a unanimous decision. [¶] We also know that he was charged with [molesting A.D.] in that prior case. There were two counts regarding [A.D.] and, again, the jury could not reach a unanimous decision. [¶] Now, here's how you can use this particular information in your analysis. So we have the uncharged evidence, that defendant has molested children before. We've

got [B.], we've got [A.D.], who you actually heard from. [¶] You may consider this evidence if you believe, by a preponderance of the evidence, that it happened, okay? So what's preponderance of the evidence? [¶] That's basically saying more likely than not it's true. It probably happened. If we have scales here, just tipped ever so slightly, that's a preponderance. [¶] If you believe that it probably happened, it was more likely than not, then it's evidence you get to consider. [¶] With respect to [B.], we know that a jury found [defendant] guilty beyond a reasonable doubt. So that's above and beyond preponderance. [¶] With [A.D.], we don't know why the jury couldn't come to a unanimous decision, but you got to hear from her. You got to assess her credibility. So if you . . . believe what she said is true, by a preponderance, that it probably happened, you get to use that evidence."

Defendant contends the prosecutor's remarks improperly suggested that the jury could use the guilty verdicts as to B. to establish his guilt on all of the charges involving B. in the prior trial, including the charges that resulted in acquittal or mistrial. He further contends that the prosecutor's remarks improperly suggested that the jury could consider both charges in the prior case involving A.D., even though A.D. only testified as to one incident of molestation in this case.

We see nothing improper about the prosecutor's remarks. The prosecutor summarized the evidence related to the prior sexual offenses and correctly pointed out that the jury could consider the offenses if they determined, by a preponderance of the evidence, that they occurred. The jury, moreover, was correctly instructed on the limited use of the prior sexual offense evidence pursuant to CALCRIM No. 1191 (now CALCRIM No. 1191A). As defendant acknowledges, the jury was expressly advised of the specific offenses it could consider, including the three convictions involving B. and the single incident of molestation that A.D. testified about at trial. The instruction did not identify any of the other charges in the prior case that defendant references. "[W]e must

presume the jury adhered to the admonitions." (*Hollie*, *supra*, 180 Cal.App.4th at p. 1277.) Under the circumstances, there is no reasonable likelihood any juror would have applied the prosecutor's remarks in the manner defendant suggests. (*Frye*, *supra*, 18 Cal.4th at p. 970.)

6.0 Cumulative Error

Because we have rejected each of defendant's claims on the merits, we likewise reject his claim that cumulative error requires reversal.

DISPOSITION

The judgment is affirmed.

BUTZ, Acting P. J.

We concur:

DUARTE, J.

HOCH, J.